A

ABDUL AZIZ MOHAMED SHARIFF

v.

PP

B

FEDERAL COURT, PUTRAJAYA
RICHARD MALANJUM CJ (SABAH & SARAWAK)
AUGUSTINE PAUL FCJ
JAMES FOONG FCJ
[CRIMINAL APPEAL NO: 05-9-2008(N)]
C 16 MARCH 2010

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Defence of intoxication - Whether available - Circumstances of the case - Whether prosecution had proved beyond reasonable doubt that appellant intended to*
D *cause death to the deceased*

The appellant was charged for murdering one Balakrishnan Karuppusamy (deceased) whose daughter he was attempting to court. The deceased had opposed the liaison. On 7 April 2000, the
E appellant proceeded to the deceased's residence wearing a mask to hide his identity and as the deceased opened the door of his house, the appellant had rushed in and slashed the deceased to death. The deceased's wife, who was present at the material time, put up a struggle with the appellant and in the course of doing so unmasked
F the appellant and exposed his identity. The appellant was subsequently arrested, charged for murder and found guilty by the High Court. He was sentenced to death in accordance with s. 302 of the Penal Code. His appeal to the Court of Appeal was dismissed; hence this appeal. The primary issue before this court
G was whether the courts below had erred in arriving at their decisions when they failed to consider the available defence of intoxication, despite the appellant not having raised this at any time during trial at first instance and on appeal.

Held (dismissing the appeal)
H **Per James Foong FCJ delivering the judgment of the court:**

(1) The circumstances of this case did not warrant the trial judge to take the defence of intoxication as a possible defence, even though not raised by the appellant, for the simple reason that
I it lacked substantiating evidence to support the claim that intoxication had in fact incapacitated the intention of the appellant to commit the said crime *Broadhurst v. The Queen*.

The prosecution had proved beyond reasonable doubt that the appellant intended to cause death to the deceased. Even if the appellant had consumed a large quantity of alcohol before committing the crime he may not be intoxicated to the extent that his intention to commit the crime had diminished. (para 16)

(2) The existence of evidence that: (a) the appellant had consumed a large quantity of alcohol or that it was even mixed with toddy, coupled with (b) the presence of a strong smell of alcohol and (c) the opinions of relatives who were not medically qualified, that the accused was drunk was insufficient to constitute a possible defence of intoxication against the preponderance of evidence indicating that he had intended to cause death to the deceased. The appellant was masked at the time when he committed the crime. Obviously, he had planned to conceal his identity for the crime he intended to commit in order to avoid detection. Thus it must have been pre-planned and could not have been conceived by an intoxicated person. Further, the appellant's ability to ride his motorcycle to various locations some distance between each other before the commission of the crime without falling and injuring himself or getting involved in an accident showed he must be mentally alert and knew what he was doing. Such mental state of mind could not have suddenly disappeared when he stabbed the deceased to death. All these circumstantial facts strongly supported the presence of an intention to commit the murder rather than being diminished by intoxication. Under such circumstances, this ground of appeal had no merit. (paras 17)

Bahasa Malaysia *Translation Of Headnotes*

Perayu telah dituduh membunuh satu Balakrishnan Karuppusamy (simati) yang anaknya perayu ingin memikat. Simati telah menentang perhubungan itu. Pada 7 April 2000, perayu telah pergi ke kediaman simati dengan memakai topeng untuk menyembunyikan identitinya dan apabila simati membuka pintu rumahnya perayu telah terus masuk dan menetak simati sehingga simati meninggal dunia. Isteri simati, yang hadir pada masa yang material itu, telah bergelut dengan perayu dan dapat membuka topeng perayu dan mendedahkan identitinya. Perayu telah ditangkap, dituduh atas tuduhan membunuh dan didapati bersalah oleh Mahkamah Tinggi. Perayu dihukum gantung mengikut s. 302 Kanun Keseksaan.

A Rayuan perayu ke Mahkamah Rayuan ditolak; oleh itu rayuan ini. Isu utama di hadapan mahkamah ini adalah sama ada mahkamah-mahkamah di bawah telah khilaf dalam membuat keputusan tersebut apabila gagal mempertimbangkan pembelaan kemabukan, meskipun perayu tidak membangkitkan perkara ini semasa
B perbicaraan di Mahkamah Tinggi dan semasa rayuan seterusnya.

Diputuskan (menolak rayuan)
Oleh James Foong HMP menyampaikan penghakiman mahkamah:

C **(1)** Keadaan kes ini tidak memerlukan hakim bicara untuk mengambil pembelaan kemabukan sebagai pembelaan kemungkinan, meskipun tidak dibangkitkan oleh perayu, atas alasan bahawa tidak terdapat keterangan yang membuktikan dan menyokong bahawa dakwaan kemabukan telah melemahkan niat
D perayu untuk melakukan jenayah tersebut (*Broadhurst v. The Queen*). Pihak pendakwaan telah membuktikan melampaui keraguan yang munasabah bahawa perayu mempunyai niat menyebabkan kematian simati. Walaupun perayu telah minum arak dalam kuantiti yang banyak sebelum melakukan jenayah
E beliau mungkin tidak mabuk sehingga tahap niatnya untuk melakukan jenayah menyusut.

(2) Kewujudan keterangan bahawa: (a) perayu telah minum arak dalam kuantiti yang banyak atau ia dicampur dengan toddy, bersama-sama dengan (b) kehadiran bau arak yang kuat dan (c)
F pendapat-pendapat saudara mara yang tidak mempunyai kepakaran perubatan, yang perayu dalam keadaan mabuk, tidak mencukupi untuk merangkumi pembelaan kemungkinan kemabukan terhadap keberatan keterangan yang menunjukkan bahawa beliau mempunyai niat untuk menyebabkan kematian
G simati. Perayu memakai topeng pada masa itu semasa melakukan jenayah tersebut. Dengan jelasnya, beliau ingin merahsiakan identitinya untuk jenayah yang beliau niat melaksanakan untuk mengelakkan dijejaki. Oleh itu ia telah dirancang dahulu dan tidak dibuat oleh orang yang mabuk.
H Seterusnya, keupayaan perayu untuk menaiki motosikal ke beberapa tempat yang jaraknya jauh di antara satu sama lain sebelum perbuatan kesalahan itu tanpa mengalami kejatuhan atau kecederaan atau terlibat dalam apa-apa kemalangan menunjukkan perayu berwaspada dan berpengetahuan mengenai
I apa yang beliau sedang melakukan. Keadaan mental yang waras dan berwaspada tidak mungkin hilang apabila perayu menikam

simati sehingga simati meninggal dunia. Fakta-fakta ikut keadaan yang sedia ada menyokong kehadiran niat melakukan pembunuhan dan bukan menyusut kerana kemabukan. Dalam keadaan tersebut, alasan rayuan ini tidak mempunyai merit.

Case(s) referred to:
Broardhust v. The Queen [1964] 2 WLR 38 ***(refd)***
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(dist)***
Juma'at Samad v. PP [1993] 3 SLR 338 ***(refd)***
K Saravanan S Karuppiah v. PP [2002] 4 CLJ 144 CA ***(refd)***
Kenneth Fook Mun Lee v. PP [2006] 4 CLJ 359 FC ***(refd)***
Loo Geok Hong v. PP [1960] 1 LNS 65 HC ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
PP v. Ramasamy Sebastian [1991] 1 MLJ 75 ***(refd)***
Ramlan Salleh v. PP [1987] 2 CLJ 300; [1987] CLJ (Rep) 314 SC ***(refd)***
Rosli Supardi v. PP [2002] 3 CLJ 544 CA ***(refd)***

Legislation referred to:
Court of Judicature Act 1964, s. 78
Penal Code, ss. 86(2), 300(a), (b), (c), (d), 302

For the appellant - Karpal Singh (Ramkarpal Singh with him); M/s Karpal Singh & Co
For the respondent - Tengku Amir Zaki Tengku Hj Abdul Rahman DPP

Reported by Suhainah Wahiduddin

JUDGMENT

James Foong FCJ:

[1] The appellant was charged for murdering one Balakrishnan Karuppusamy (deceased) whose daughter, he was attempting to court. The deceased had opposed this liaison. On 7 April 2000, the appellant proceeded to the deceased's residence wearing a mask to hide his identity and as the deceased opened the door of his house rushed in and slashed the deceased to death. The deceased's wife, who was present at the material time put up a struggle with the appellant and in the course of doing so unmasked the appellant and exposed his identity. The appellant was subsequently arrested, charged for murder and found guilty by the High Court. He was sentenced to death in accordance with s. 302 of the Penal Code. His appeal to the Court of Appeal was dismissed; hence this appeal.

[2] Throughout his trial, both in the High Court and the Court of Appeal, the appellant had not indicated that he was intoxicated when the offence was committed. His defence rested solely on provocation by the deceased. Now, in this appeal his counsel argued that the courts below had failed to consider this element of intoxication in arriving at their decisions. According to his counsel, he must be intoxicated after consuming large quantities of toddy and spirit prior to the commission of the crime. This could have had a bearing on his state of mind to commit the murder. In short, the intention to commit the said crime may be absent. Failure by the courts below to take this into account is a misdirection and therefore the appellant should be acquitted.

[3] So the primary issue before this court is whether the courts below had erred in arriving at their decisions when they failed to consider this available defence of intoxication, despite the appellant not having raised this at any time during trial at first instance and on appeal.

[4] It is a long established principle that:

> A defence however weak and whether raised in evidence or even in a statement from the dock or by way of explanation must be left to the jury, Dinnick, 3 Cr. App. Rep. 77. Richards, 4 Cr. App, Rep, 161. Hill, 7 Cr. App. Rep. 26. Any point on which there is evidence which may afford a defence should be drawn to the attention of the jury, even if the defence has not raised it *Rex v. Hooper*, [1915] 2 K.B. 431; 11 Cr. App. Rep. 136 and even if it is inconsistent with the defence *Rex v. Thorpe*, 41 T.L.R. 468; 18 Cr. App. Rep. 189. The judge has great freedom in pointing out to the jury the value of the evidence or the improbability of the defence provided he puts the defence fairly to the jury. Further, if there is no evidence which might reduce a charge of murder to a lesser offence the judge should not leave the question of the lesser offence to the jury" - per McElwaine O in *Rex v. Ong Choon* [1938] 7 MLJ 227.

[5] This was repeated by the Court of Appeal in *Loo Geok Hong v. Public Prosecutor* [1960] 1 LNS 65; [1961] 27 MLJ 157 where at 158 Thomson CJ advised:

> Now, generally speaking, as a matter of law a Judge sitting with a jury should put to the jury any defence available on the evidence irrespective of whether or not reliance has been placed on that defence at the trial or indeed irrespective of whether or not it has been mentioned by counsel at the trial.

[6] Again this was reiterated by the Supreme Court in *Ramlan Salleh v. Public Prosecutor* [1987] 2 CLJ 300; [1987] CLJ (Rep) 314 @ 316: A

> In jury trial, the first duty of the Judge in dealing with the defence case is to put to the jury the defence put up by the accused even if such defence appears to him to be too far-fetched and ought to be rejected. Such defence may constitute a lesser offence than murder, or it may even be lesser than culpable homicide not amounting to murder. The trial Judge is of course at liberty to comment on the evidence and in rare and appropriate cases may even make unfavourable remarks on the defence put up by the accused provided he makes it very clear to the jury that they are not bound by his view and opinion on issues of fact. His next duty is to put to the jury all available defences whether or not relied upon by the accused, having regard to the evidence. But as was held by the Court of Appeal in *Loo Geok Hong v. Public Prosecutor*, the way in which the jury is to be directed on available defences is a matter for the trial Judge having regard to the evidence with which he is concerned. What is important is the effect and not the form of the direction.

B C D

[7] As jury trial has been abolished, the law is clear that it is still incumbent upon the trial judge to direct himself to any available defences, whether raised or not raised by the accused, from the evidence before him. E

[8] In this instance, evidence was adduced by the appellant's sister (SP8) that the accused went to her house before the incident and his condition was: F

> dia dalam keadaan mabuk kerana saya ada bau minuman keras apabila dia bercakap dengan saya. Masa itu saya sedang berada di rumah jiran saya. Anak saya Amir Hussin datang ke rumah jiran di mana saya berada dan beritahu saya 'mamu' ada datang tetapi dia mabuk...
>
> Lepas itu saya balik ke rumah dan berjumpa dengan Abd. Aziz. Saya menegur dan memarahi dia kerana keadaannya yang mabuk Itu.

G H

[9] This claim was confirmed by the appellant's nephew (SP9) who testified:

> Apabila dia masuk ke dalam rumah dan minum air, emak saya ada di rumah kawannya. Saya pun pergi panggil emak saya dan beritahu dia "mamu" mabuk. Mulutnya berbau. Lepas itu saya balik ke rumah dan layan pakcik.

I

[10] Further evidence of intoxication came from the appellant himself who said in his testimony on oath:

> Pada 7.4.2000 saya berada di Bahau dan bangun lebih kurang 12.00 tengah hari sebab tak ada kerja untuk menoreh hari itu. Sebelum itu saya ada diberitahu oleh kawan ada madu lebah di Rompin. Saya membawa bersama saya satu baldi dan sebilah parang, Saya ada berjumpa seorang kawan nama Ashok untuk mencari madu lebah. Asok pula ajak saya untuk pergi minum todi. Ada 2 orang lagi bersama Ganesh dan Prabakaran.
>
> Saya tiba di Rompin lebih kurang 2.30 - 3.00 petang dengan Ashok, Kami berdua tidak pergi ke kedai tersebut Mereka pun pergi beli todi di Middleton Estet. Jaraknya saya tak tahu tetapi akan memakan masa 20 minit Mereka pergi selama 2 jam.
>
> Seterusnya kami pergi ke sebuah ladang berhampiran dengan pekan untuk minum todi. Kami berada di ladang itu lebih kurang 1 1/2 jam. Kami berehat minum todi tersebut hingga habis.
>
> Selepas itu kami rasa todi tak cukup dan kami pun pergi beli minuman 'Chap Chong' dan menuju ke New Rompin Estet. Kami di situ hingga 7 malam. Kami berempat minum itu sehingga habis.

[11] The appellant's counsel stressed that the appellant's state of mind would be affected by the quantity of spirit consumed before he committed the offence on that day. This would bring him within the fourth exception of s. 300(d) of the Penal Code which reads;

> Except in the cases hereinafter excepted, culpable homicide is murder:
>
> (d) if the person committing the act **knows** that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid (emphasis added).

[12] And when considering whether the appellant "knows" of the consequences of his act, due consideration must be paid to s. 86(2) of the Penal Code which says:

> Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

[13] Obviously, the approach is unsustainable in the light of this court's decision in *Kenneth Fook Mun Lee v. Public Prosecutor* [2006] 4 CLJ 359. There, the different mental conditions demanded by s. 300 PC was discussed in conjunction with s. 86(2) Penal Code. To appreciate this, it is necessary to spell out all the four clauses of s. 300 Penal Code which are:

> Except in the cases hereinafter excepted, capable homicide is murder:
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) If it is done with intention of causing bodily injury as the offender knows to be likely to cause death of the person to whom the harm is caused;
>
> (c) If it is done with intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary cause of nature to cause death; or
>
> (d) If the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid,

[14] One would notice that in s. 300(d) Penal Code, the word used to describe the mental element of the accused is: "knows" as compared to s. 300(a), (b) and (c) Penal Code which use the word "intention". And when one looks at s. 86(2) Penal Code, the word used to describe the mental condition is "intention" which is similar to that appearing in s. 300(a), (b) and (c) of the Penal Code. This caused Yong Pung How CJ Singapore in the case of *Juma'at Samad v. Public Prosecutor* [1993] 3 SLR 338 (which carries identical provisions as our Penal Code) to comment:

> It is observed that cll. (a), (b) and (c) of s. 300 contemplate intention in one form or another. In cl. (a), it is intention to cause death. In cll. (b) and (c), it is intention to cause bodily injury. On the other hand, there is no requirement of an intention to cause death or bodily injury in cl. (d) of s. 300 ('cl (d)'). Thus, intention is not necessary element in cl. (d); all that is required to be proved is knowledge that the act is likely to cause death (see *Inder Singh v. Crown* [1928] ILR 10 Lah). It has been held that this clause is intended to apply only when there is no intention to cause death, or

A in other words, when the three earlier clauses are inapplicable (see *Hasta Ismail v. Emperor* AIR 139 Lah 593; *Behari v. State* AIR 1953 All 203) Section 86 is therefore applicable to cll. (a), (b) and (c) of s. 300 and inapplicable to cl. (d).

B In respect of this, Richard Melanjum FCJ (as he then was) in *Kenneth Fook Mun v. PP (supra)* sets out the Malaysian position as follows:

Our answer to the argument is that s. 86(2) only affects those offences which require intention, specified or otherwise, and C excludes other type of *mens rea*. But since cl. (d), involves merely knowledge and not intention, it is therefore not within the ambit of s. 86(2). Put, it in another way, intoxication is irrelevant in securing a conviction for murder if knowledge as per in cl. (d) is proved beyond reasonable doubt by the prosecution. Such conclusion may appear to be preposterous. But it appears to be the position of the D law for now. The difficulty posed by s. 86(2) was recognized and discussed in the case of *Juma'at bin Samad v. Public Prosecutor* where it was said ...

[15] When s. 86(2) of the Penal Code is not applicable for E consideration in an offence under s. 300(d) of the Penal Code, then what the appellant has submitted: that the trial judge has failed to take into account s. 86(2) of the Penal Code for an offence under s. 300(d) of the Penal Code must fail.

[16] Even if I were to consider the appellant's argument and apply F s. 86(2) of the Penal Code to the other clauses of s. 300 of the Penal Code ie, s. 300(a), (b) and (c), where the mental state is described as "intention" rather than "knows", the fact remains that the circumstances of this case does not warrant the trial judge to take this into consideration as a possible defence, even though not G raised by the appellant, for the simple reason that it lacks substantiating evidence to support the claim that intoxication had in fact incapacitated the intention of the appellant to commit the said crime - see *Broardhust v. The Queen* [1964] 2 WLR 38 @ 51. The reason is this: the prosecution has proved beyond reasonable H doubt that the appellant intended to cause death to the deceased. Even if the appellant had consumed a large quantity of alcohol before committing the crime he may not be intoxicated to the extent that his intention to commit the crime had diminished. The effect of alcohol varies substantially with different people. This was I observed by Chao Hick Tin JC (as he then was) in the Singapore case of *PP v. Ramasamy Sebastian* [1991] 1 MLJ 75 @ 8 where he

said that even "blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused. Different people react differently to the same blood alcohol level. It makes a great difference whether the person is or is not an experienced drinker". To prove intoxication, it is encumbered upon the defence to adduce sufficient evidence to convince the court that this had rendered the accused incapable of forming the necessary intention or knowledge to commit the crime charged, or that "he was by reason of intoxication insane, temporarily or otherwise, at the time when he committed the crime".

[17] The existence of evidence that: (a) the appellant had consumed a large quantity of alcohol or that it was even mixed with toddy, coupled with (b) the presence of a strong smell of alcohol, and (c) the opinions of relatives who are not medically qualified, that the accused was drunk is insufficient to constitute a possible defence of intoxication against the preponderance of evidence indicating that he had intended to cause death to the deceased. The appellant was masked at the time when he committed the crime. Obviously, he had planned to conceal his identity for the crime he intended to commit in order to avoid detection. This must have been pre-planned and could not have been conceived by an intoxicated person. Next, was the appellant's ability to ride his motor cycle to various locations some distance between each other before the commission of the crime without falling and injuring himself or getting involved in an accident. To avoid all these, he must be mentally alert and knew what he was doing. Such mental state of mind could not have suddenly disappeared when he stabbed the deceased to death. In fact all these circumstantial facts strongly support the presence of an intention to commit the murder rather than being diminished by intoxication. Under such circumstances it is my considered opinion that this ground of appeal has no merit.

[18] The appellant's counsel has also raised two other issues which are minor but for completeness I shall deal with them.

[19] The first concerns the judgment of the trial judge which is in two parts: one written after the close of the prosecution's case and the other after defence was called. For this, the appellant complained that this is against the law and cited the High Court case of *Jaafar Ali v. Public Prosecutor* [1999] 1 CLJ 410 in support.

[20] To begin, I must point out that the facts in *Jaafar Ali v. Public Prosecutor (supra)* can be distinguished. In that case, the so called judgment was purportedly in three parts. One properly composed after defence was called and the other two: (i) reasons for calling the defence after close of prosecution case and (ii) reasons for the sentence imposed are found in the notes of evidence. I agree that it is desirable to have a comprehensive judgment encompassing all aspects of the case but it is not unprecedented for a trial judge, as in this case, to write a proper judgment giving his grounds on why defence was called and another on why he disbelieved the defence. The only reservation over this is that these two were not bound into one single volume. This, in my opinion is a trivial matter. In fact it is a common practice among judges of first instance trying a criminal case to prepare separate judgments for distinctive aspects of a case; for example: why defence was called or the reason for the admission or the refusal to admit a caution statement after *voir dire* (a trial within a trial). This practice is acceptable as long as there is, at the end of the trial, a speaking judgment which is comprehensible; it can be in parts dealing with distinctive aspects of the same case.

[21] The second issue relates to a passage in the grounds of judgment of the High Court after defence was called which says:

> Berdasarkan sebab-sebab di atas saya berpendapat pembelaan telah gagal untuk menimbul keraguan yang munasabah didalam kes pendakwaan diatas imbangan keberangkalian, Daripada keterangan yang ada, saya berpendapat pihak pendakwaan telah berjaya membuktikan kesnya ditahap melampaui keraguan yang munasabah.

Translated into English:

> Based on the reasons aforesaid, I am of the opinion that the defence has failed to raise a reasonable doubt in the prosecution case on the balance of probability. From the evidence adduced I am of the view that the prosecution has proved its case against the accused beyond reasonable doubt.

[22] Against this, the appellant argued that trial judge has misdirected himself on the standard of proof required of the defence.

[23] It is trite that all that is necessary is for an accused person in his defence to cast a reasonable doubt in the prosecution's case to earn an acquittal - see *Mohamad Radhi Yaakob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 and *K Saravanan S Karuppiah v. PP* [2002] 4 CLJ 144 @ 153. Though the trial judge

had this in his forethought, he added "on the balance of probability". But as reiterated by the Supreme Court in *Mohamad Radhi Yaakob v. Public Prosecutor (supra)*: "To satisfy this test it is not so much the words used by the judge, but rather the actual application of the test to the facts of the case that matters". I am of the view that having read the judgment of the High Court in its entirety, particularly the reasons advanced to support the decision, this error caused by the addition of the phase "on the balance of probability" is insufficient to affect his finding that the appellant is guilty of the crime as charged. The inclusion of this phase in my view is a mere verbosity - see *K Saravanan S Karuppiah v. PP (supra)*, *Rosli Supardi v. PP* [2002] 3 CLJ 544, which does not affect the conclusion arrived at by the trial judge.

[24] For reasons aforesaid, I would dismiss this appeal. My learned brother judge Richard Malanjum CJSS agrees with me in this decision. And pursuant to s. 78 of the Court of Judicature Act 1964, in the absence of my brother judge, the late Augustine Paul FCJ, this decision that this appeal is dismissed is by majority given by Richard Malanjum CJSS and myself as the remaining judges who heard this case.